widow are minors do not in my view constitute such special circumstances as would enable the court to pass the appellants over.

I would allow the appeal and set aside the grant of letters of administration to the trust corporation. The respondent has through her counsel indicated that she desires to be joined as administrator in the event of this court setting aside the grant to her nominee and having regard to the rights of all persons interested in the estate I would grant letters of administration to the petitioners and to the respondent.

Wee Chong Jin C.J. (Singapore): I agree.

Tan Ah Tah F.J.: I agree.

Appeal allowed.

Solicitors: *Oehlers & Choa; R. C. H. Lim & Co.*

COMPTROLLER OF INCOME TAX v. B. & C. CO. LTD.

[O.C.J. (Gill J.) February 11, 1966]

[K.L. — Civil Suit No. 630 of 1964]

Income Tax Ordinance, 1947, s. 40 — Tax on dividends — Liability of company to pay.

The defendants in this case had in 1958 declared a dividend of $250,000 from which they were entitled to deduct shareholders tax at the rate of 30%. In fact they paid for the year of assessment, 1958, only a portion of this tax, leaving a balance of $74,825 which sum the plaintiff claimed from them. The defendants pleaded that they had paid the tax assessed on them for the year 1959 which was based on the whole of their profits for 1958 including a sum of $357,142 out of which the nett dividend of $250,000 was declared by them in 1958. They contended that as they had paid the income tax for the year 1959 on the whole of their profits for 1959 including that part of the profits as gross dividends out of which the nett dividend was declared, the debt of $74,825 payable had in fact been fully discharged.

Held: under section 40 of the Income Tax Ordinance the defendants were required to deduct tax from the shareholder's dividend and to pay the tax to the Comptroller of Income Tax and they were not entitled to retain the sums so to be deducted or any part thereof and carry it over against their future indebtedness in respect of income tax.

Cases referred to:—

(1) *Government of the Federation of Malaya* v. *A. Omnibus Co. Ltd.* [1963] M.L.J. 14, 16, P.C.

(2) *A. Omnibus Co. Ltd.* v. *Government of the Federation of Malaya* [1961] M.L.J. 92, 94, C.A.

CIVIL SUIT.

Wan Hamzah bin Wan Salleh (Federal Counsel) for the plaintiff.

Ng Ek Teong (*R. Padmanabhan* with him) for the defendants.

Gill J.: The plaintiff's claim in this suit is for a sum of $74,825 which is alleged to be a debt due to the Government by the defendants by virtue of section 40(4) of the Income Tax Ordinance, 1947 (hereinafter called "the Ordinance").

There is no dispute about the facts of the case all of which are set out in the pleadings. The only evidence adduced at the trial was that of the secretary of the defendant company who testified as to the chargeable incomes of his company for the years of assessment 1957, 1958 and 1959 and the amounts of income tax paid thereon for the respective years.

The claim, as set out in the amended statement of claim, is made up as follows. On 10th October, 1958 the defendants declared a dividend of $250,000. Under section 40(1) of the Ordinance they were entitled to deduct from the dividend of $250,000 paid to their shareholders tax at the rate of 30% of every dollar of such dividend (the rate has since been increased to 40%). Under section 40(6) of the Ordinance a sum of $107,142 was deemed to have been deducted by them as tax in respect of the aforesaid dividend. The amount of income tax payable by them in respect of the year of assessment 1958 was $31,614 and the amount carried forward from the year of assessment 1957 in accordance with section 40(5) was $703, making an aggregate of $32,317. After deducting this aggregate sum of $32,317 from the tax deduction of $107,142, the balance of $74,825 became due and payable by them under section 40(4) of the Ordinance which they have failed and neglected to pay.

The defendants in their amended statement of defence do not question the propriety or the correctness of the claim. They aver that no demand for payment of the said sum of $74,825 was made until 20th March, 1960, by which date the plaintiff had assessed the income tax payable by them for the year of assessment 1959. This income tax for the year 1959 was based on the whole of their profits for the year 1958 amounting to $426,738 which included the sum of $357,142 out of which the net dividend of $250,000 was declared on 10th October, 1958. The amount of such income tax was $117,695.20 and it was in fact paid. They therefore contend that income tax having been paid for the year of assessment 1959 on the whole of their profits for 1958 including that part of the profits as gross dividend out of which the net dividend was declared, the debt of $74,825 payable under section 40(4) of the Ordinance has in fact been fully discharged.

What the defendants are saying is that, although it is true that they became liable to pay a debt of $74,825 under section 40(4) of the Ordinance as on 31st December, 1958, this debt was wiped off by their paying, before a demand for its payment was made on 20th March, 1960, a considerably larger sum by way of income tax

in the year 1959. Thus, their defence is in the nature of a plea of confession and avoidance. This plea, however, is not open to them because of the scheme of arrangement contained in section 40 of the Ordinance under which they are permitted to recoup themselves out of tax deductions from shareholders' dividends for any income tax payable by them. This is crystal clear from the following passage in the judgment of the Privy Council in *Government of the Federation of Malaya* v. *A. Omnibus Co. Ltd.*[1]:—

"Thus section 40 provides a sensible and intelligible scheme. The company can by deduction (or deemed deduction) of tax from the dividends paid to shareholders recoup itself for any tax payable by it. A running account is allowed whereby the company can carry forward any amounts for which it has hitherto failed to recoup itself in respect of tax payable by it in previous years. As soon however as it collects from its shareholders more tax than it has had to pay, the excess becomes due to the Government. There is, however, no provision by which it can retain the excess and carry it over against its future indebtedness for tax. It cannot recoup itself in advance."

That statement of the law by the Privy Council demolishes the argument put forward by the defendants' counsel, Mr. Ng Ek Teong, that tax deduction under section 40 is in effect retention by the company in advance of the income tax which it is liable to pay under section 39 of the Ordinance.

It has been further argued on behalf of the defendants that section 40 does not create a new liability in addition to the liability to pay income tax under section 39 of the Ordinance. There is substance in that argument, but only to the extent that in certain circumstances, as set out in section 40 to which reference has been made above, a company can recoup itself for any income tax payable by it under section 39 of the Ordinance out of tax deductions from the shareholders' dividends. However, there can be no doubt that the debt arising under section 40(4) of the Ordinance and the income tax payable under section 39 of the Ordinance are two separate liabilities which the company must discharge separately, subject of course to what might be called their merger under the circumstances set out in section 40. The discharge of one liability does not necessarily discharge the other liability either wholly or in part.

To use the words of Thomson C.J., as he then was, in his dissenting judgment in *A. Omnibus Co. Ltd.* v. *Government of the Federation of Malaya* [2] which was approved when it came before the Privy Council in the case which I have cited above, "what the plaintiff is suing for is not income tax as such but a debt which has come into existence by reason of the provisions of section 40 of the Ordinance". After making his first preliminary observation in those words in that case the learned Chief Justice went on to say:

"In the second place, it is not correct to say that the company was compelled by law to issue the dividend certificates it did issue. It is true that it was in effect compelled by the provisions of section 40, to which I am coming shortly, to issue certificates in that form but the contents of those certificates was something that was within the control of the directors.....I am not saying for one moment that the directors are not at liberty to arrange the affairs of the company as they see fit or that they are not at liberty to declare such dividends as they see fit. The point is that if they arrange their affairs in the light of an incorrect view of the taxation law and if this produces unfortunate consequences they can have no complaint as to the operation of that law. They may complain as to the law itself, but that is a different matter."

The concluding words in the above passage provide an effective answer to the defendants' complaint about the so-called double taxation, because quite clearly the predicament in which they find themselves has been brought about by their arranging their affairs in the light of an incorrect view of the taxation law. Had they delayed declaring their dividend by three months these proceedings would not have arisen.

A still further argument advanced on behalf of the defendants is that the words "any person" in section 42 of the Ordinance may include a company which has deducted or is entitled to deduct any tax from any dividend under the provisions of section 40 of the Ordinance, because the words are "any person" and not "any other person". The futility of this argument lies in the fact that a tax deduction from a dividend paid out to a shareholder can only be included in the chargeable income of that shareholder for the purpose of section 42 of the Ordinance, although, if the shareholder is a married woman, it will get included in the chargeable income of her husband. Tax deductions from dividends can be set off only against income tax payable by the company and in accordance with the scheme of arrangement under section 40 of the Ordinance and in no other way.

From what I have stated above it seems clear to me that the defendants have no answer to the plaintiff's claim in the present case. Income tax payable by them for the year of assessment 1957 was $703. This amount they were allowed under section 40(5) of the Ordinance to carry forward to be set off against tax deductions from dividends in the ensuing year. For the year of assessment 1958 income tax payable by them was $31,614. Thus they had an aggregate of $32,317 to be set off against tax deductions from dividends declared during that year. In the same year they declared a dividend of $250,000. On the basis of their entitlement to a tax deduction of 30% under section 40(1) of the Ordinance, the gross amount of the dividend out of which the net dividend of $250,000 was declared with $350,142. This amount is arrived at by a simple arithmetical calculation, the formula being that if 70% of the

gross dividend was $250,000, the whole gross dividend (or 100% of the gross dividend) would be $350,142. The difference of $107,142 between the gross dividend and the net dividend was deemed under section 40(6) of the Ordinance to be the amount of tax deductions from dividends.

At the end of the year of assessment 1958 the defendants were required under section 40(3) of the Ordinance to render to the comptroller a statement showing the sum of $107,142 as the total amount of tax deductions from shareholders' dividends during that year. The comptroller was required under the same section to compare such tax deductions with income tax payable by the defendants in respect of that year of assessment and the amount carried forward from the previous year. Upon such comparison the amount by which tax deductions exceeded the aggregate of income tax payable became a debt due from the defendants to the Government under section 40(4) of the Ordinance. It is common ground that this excess amounted to $74,825. There is no law under which they could retain this excess and carry it over against their future indebtedness in respect of income tax. The fact that no demand was made for the payment of this debt until 20th March, 1960 does not make them any the less liable, and it is no more relevant than a similar argument in the case of an ordinary debt where a creditor chooses to take his own time to make a demand upon his debtor so long as he does it within the period of limitation. In the circumstances there will be judgment for the plaintiff against the defendants in the sum of $74,825 and costs.

Judgment for the plaintiff.

Solicitors: *Braddell & Ramani.*

TAN HOI HUNG v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Ong Hock Thye F.J.) February 12 1966]

[J.B. — Federal Criminal Appeal No. X 27/65]

Internal Security — Consorting with members of Indonesian armed forces and possession of arms and ammunition — Defence of duress — Penal Code, s. 94 — Sentence — Mitigating circumstances — Internal Security Act, 1960, ss. 57, 58 & 69.

Criminal Law and Procedure — Defence of duress — Mitigation — Reduction of sentence.

The appellant had been convicted of a charge under the Internal Security Act for consorting with Indonesian Armed Forces and sentenced to death. The defence raised was one of duress, that is that the appellant did what he did by reason of having been under the threat of death. On appeal,

Held: (1) the effect of section 69 of the Internal Security Act is to deprive a person accused of an offence punishable with death under Part II of the Act of the right to set up fear as something affecting his criminal responsibility and therefore the trial judge was right in disregarding any defence based on threats and fear of death inspired by threats;

(2) the appellant's story of threats should have been considered as something that might have afforded mitigating circumstances and as the learned trial judge had failed to apply his mind to this matter, the sentence would be reduced to one of imprisonment for life.

Case referred to:—

(1) *Subramaniam* v. *Public Prosecutor* [1956] M.L.J. 220, P.C.

FEDERAL COURT.

T. G. Sim for the appellant.

Abdul Hamid bin Dato' Azmi (Deputy Public Prosecutor) for the respondent.

Thomson L.P. (delivering oral judgment): This appellant was prosecuted on three charges under the Internal Security Act: for unlawful possession of a fire-arm in contravention of section 57(1)(a); for unlawful possession of ammunition in contravention of section 57(1)(b); and for consorting in contravention of section 58(1). On the first two charges he was acquitted and on the third charge he was convicted and sentenced to death.

Against that conviction and sentence he has now appealed.

The matter arose out of one of the recent numerous invasions of this country from Indonesia. Some time in March this year one of these invasions took place near Kota Tinggi which terminated in what was nothing short of a battle on 3rd April, 1965. It was a real battle in the sense that people were killed in the course of it. At or towards the end of that battle the appellant was arrested by security forces but there is no evidence of his active participation in that battle.

As regards how he came to be there, I propose to deal with the matter on the basis of his own account which is the basis most favourable to him and which in any event is not contradicted on any material point by any of the other prosecution evidence.

It is contained in a statement he made to the police after his arrest. That statement was a long and circumstantial one and when the time came for him to make his defence he repeated it from the dock.

Briefly, his story was that in 1963 he was engaged in his occupation as a fisherman at sea near Pontian. He was (to use his own word) "arrested" by Indonesians who put him into a boat where he was assaulted and locked up in a small cabin. After a voyage of some hours he was taken ashore to a house where he was confined for about 10 months. Then after various journeys which it is unnecessary to recount he was told that he was coming to Malaysia with a